Uthayakumar a/l Ponnusamy v Public Prosecutor

HIGH COURT (SHAH ALAM) — REVISION APPLICATION NO 43-1 OF 2003
SURIYADI J
5 MAY 2003

Criminal Procedure *— Acquittal or discharge — Discharge of accused under Criminal Procedure Code (FMS Cap 6), s 173(g) — Meaning of 'previous stage' in s 173(g) — Whether applicant could request for a discharge — Whether the court could sustain a discharge not amounting to an acquittal — Criminal Procedure Code s 173(g)*

Criminal Procedure *— Charge — Error in charge — Charge did not identify under which limb of s 506 the applicant was charged — Charge did not contain the mens rea — Penal Code s 506*

Criminal Procedure *— Revision — Refusal of magistrate to decline from presiding over two charges — Refusal of magistrate to decline from hearing bail matter — Whether magistrate just recording pleas and hearing bail matter — Whether magistrate had exercised a judicial power*

On 31 January 2003, the court received an application from Messrs M Manoharan to revise the decision of the learned magistrate of the Magistrate's Court, Sepang meted down on 21 January 2003, on the premise that the learned magistrate refused to decline from presiding over two charges (and one alternative charge) preferred against Mr P Uthayakumar, an advocate and solicitor ('the applicant'). The learned magistrate also refused to exercise his powers pursuant to s 173(g) of the Criminal Procedure Code to discharge the applicant. The charges were ss 228 and 506 of the Penal Code, but the s 228 charge (and the alternative charge) was dropped on a later date. The applicant had been present at the Magistrate's Court, Sepang on 3 September 2002 representing two families in two inquest proceedings conducted by the learned magistrate and assisted by two deputy public prosecutors. The applicant was permitted to cross-examine PW1. In the course of the questions and answers exercise, the applicant made an allegation of criminal negligence against PW1. On the same day, PW1 lodged a police report against the applicant and the applicant was arrested on 16 January 2003. According to the applicant, he was verbally abused and stripped down to his underpants in full view of nine policemen. On 20 January 2003, the applicant lodged two police reports, the first against the identifiable police officers who had allegedly deprived him of his constitutional rights and the second against PW1 for lodging a supposed false report. A day after lodgment of such reports, the applicant was charged with such promptitude in court for the offences of criminal intimidation (s 506 of the Penal Code) and intentionally insulting or interrupting a public servant sitting in a stage of a judicial proceeding (s 228 of the Penal Code). The charges were read out before the magistrate who had conducted the abovementioned inquests, as was the bail matter.

At that stage, counsel for the applicant requested that the learned magistrate decline from presiding over the proceedings and/or dismiss the charges for being groundless and baseless pursuant to s 173(g) of the Criminal Procedure Code. The learned magistrate was of the view that he was not hearing the case but was recording the pleas and deciding the bail amount. A B

Held, setting aside the learned magistrate's order and ordering the applicant to be discharged of the s 506 accusation:

(1) The learned magistrate had not just been a mere stenographer for purposes of recording the pleas and the proceedings, but had in fact been enthusiastically active in a judicial making exercise. He had exercised judicial power, which is vested not only in the two High Courts but also in the magistrate's court as legislated in art 121(1) of the Federal Constitution. The issue of bail was within the purview of the concept of judicial power, *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 and *Huddart Parker & Co, Proprietary, Ltd v Moorehead, Appleton v Moorehead* (1909) 8 CLR 330 followed. The learned magistrate should have been the last person to hear the bail matter, for the obvious reason of him being an interested party. Even if he had considered that the bail amount was fair, the perception gathered by the public would certainly militate against it. This was not a mere recording exercise to be acted upon by an incoming officer but an active participation in a judicial act (see pp 442H–443A, D–F). C D E

(2) On the issue of the applicant's ventilation that the charge or charges were groundless, the learned magistrate was exercising his judicial powers and not merely recording the pleas or proceedings of the day. The public's view would have been that the decision of the learned magistrate was founded not on the lack of evidence or the inadequacy of the applicant's submissions but substantially on the sentiments held by the learned magistrate against the former. The failure of the learned magistrate to minute the exchanges between him and the applicant, and the request of the applicant to have the charges dropped may be an indication of the charged atmosphere at that juncture. Regardless of that, that failure had become irrelevant in the light of a highly interested party, in total disregard of appeals by the applicant to see him step down, continuing to hear the substantive legal matters. Section 439 of the Criminal Procedure Code promulgates that no magistrate shall, except with the permission of the High Court, to which an appeal lies from his court, try any case to or in which he is a party or personally interested (see pp 444A–B, D–E, 445B–D). F G H

(3) Apart from the charge of s 506 being factually incorrect, it was also badly drafted, which would certainly prejudice the rights of the applicant. A close scrutiny of s 506 revealed that there were two sets of limbs of intimidation, namely simple intimidation or a more serious version where, among others, the threat to life or I

property is involved. The charge against the applicant had failed to identify under which limb or set he was charged with. As the charge had not clarified the threat, then in the minimum, the applicant was being charged for the lighter limb. Under s 503 of the Penal Code, to qualify even as a simple criminal intimidation, not only must there be the actus reus, but also the mens rea. The charge facing the applicant had missed the second ingredient of intent or mens rea (see pp 445E–H, 446B–C).

(4) A scrutiny of the notes of proceedings of 3 September 2002 failed to reveal any utterances of that nature, at the time or place, the opportunity, or for that matter comments by the court. The notes of proceedings were more than sufficient to rebut the first charge (see p 447F).

(5) Under s 173(g) of the Criminal Procedure Code, a court may sustain a discharge not amounting to an acquittal in certain circumstances. When Parliament had legislated the words 'discharging the accused at any previous stage of the case if ... the charge to be groundless', that 'previous stage' must mean, in terms of time and order, a period before the stage envisaged by s 173(f). The court construed s 173(g) as being wide enough to include the time when the charge was read out the first time to the accused, before the learned magistrate. So, as soon as a person is committed before the court, before any evidence is heard, ie before the trial commences, an accused may request for a discharge. A discharge may be warranted when the absence of grounds is clearly established by the evidence on record, with the attainment of a conviction being impossible. In this case, apart from the charge being badly framed much to the prejudice of the applicant, as the words uttered were very specific and made at a specified time but yet rebutted at the outset of the case by the notes of proceedings prepared by the court, conviction thus was impossible. The s 506 charge was groundless and had fallen squarely within the ambit of s 173(g) (see pp 448C, H–I, 449B–D).

[Bahasa Malaysia summary

Pada 31 Januari 2003, mahkamah telah menerima suatu permohonan daripada Tetuan M Manoharan untuk menyemak keputusan majistret yang arif, Mahkamah Majistret, Sepang yang diberi pada 21 Januari 2003, di atas premis bahawa majistret yang arif enggan berhenti menghakimi dua pertuduhan (dan satu pertuduhan alternatif) yang dibuat terhadap En P Uthayakumar, seorang peguambela dan peguamcara ('pemohon'). Majistret yang arif juga enggan menggunakan kuasa beliau menurut s 173(g) Kanun Acara Jenayah untuk melepaskan pemohon. Pertuduhan-pertuduhan tersebut merupakan ss 228 dan 506 Kanun Keseksaan, tetapi pertuduhan s 228 (dan pertuduhan alternatif) akan digugurkan pada tarikh lain. Pemohon telah menghadiri Mahkamah Majistret, Sepang

pada 3 September 2002 mewakili dua buah keluarga di dalam dua prosiding inkues yang dikendalikan oleh majistret yang arif dan dibantu oleh dua orang timbalan pendakwa raya. Pemohon telah dibenarkan menyoal balas PW1. Semasa menyoal dan menjawab soalan, pemohon telah membuat pengataan kecuaian jenayah terhadap PW1. Pada hari yang sama, PW1 telah membuat satu laporan polis terhadap pemohon dan pemohon telah ditangkap pada 16 Januari 2003. Menurut pemohon, beliau telah dianiaya secara lisan dan pakaian beliau, kecuali seluar dalam, telah ditanggalkan di hadapan sembilan orang polis. Pada 20 Januari 2003, pemohon telah membuat dua laporan polis, pertama terhadap polis-polis yang dapat dicamkan yang dikatakan telah melucutkan hak perlembagaan beliau dan terhadap PW1 kerana telah membuat laporan yang dikatakan palsu. Sehari selepas membuat laporan-laporan tersebut, pemohon telah dengan segera dituduh di dalam mahkamah untuk kesalahan-kesalahan intimidasi jenayah (s 506 Kanun Keseksaan) dan menghina atau mencelah seorang pegawai awam di dalam suatu tahap prosiding kehakiman (s 228 Kanun Keseksaan). Pertuduhan-pertuduhan tersebut telah dibaca di hadapan majistret yang telah mengendalikan inkues yang dikatakan, seperti juga dengan pendengaran ikat jamin. Pada tahap itu, peguam bagi pemohon telah memohon supaya majistret yang arif tidak menghakimi prosiding-prosiding dan/atau menolak pertuduhan-pertuduhan kerana tidak berasas dan tidak berdasar menurut s 173(g) Kanun Acara Jenayah. Majistret yang arif berpendapat bahawa beliau tidak mendengar kes itu tetapi merekod pli-pli dan memutuskan perkara jaminan.

Diputuskan, mengenepikan perintah majistret yang arif dan memerintah pemohon dilepaskan daripada pertuduhan s 506:

(1) Majistret yang arif bukan merupakan jurutrengkas untuk merekod pli-pli dan prosiding-prosiding, tetapi telah aktif di dalam membuat keputusan kehakiman. Beliau telah melaksanakan kuasa kehakiman, yang bukan sahaja diletakhak pada kedua-dua Mahkamah Tinggi tetapi juga pada mahkamah majistret seperti yang digubalkan di dalam perkara 121(1) Perlembagaan Persekutuan. Isu jaminan adalah di dalam skop konsep kuasa kehakiman, *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 dan *Huddart Parker & Co, Proprietary, Ltd v Moorehead, Appleton v Moorehead* (1909) 8 CLR 330 diikut. Majistret yang arif patut menjadi orang yang terakhir mendengar permohonan ikat jamin, oleh kerana jelas bahawa beliau merupakan parti yang mempunyai kepentingan. Walaupun jika beliau berpendapat bahawa jumlah ikat jamin adalah adil, anggapan orang awam akan menghalangnya. Ini bukan merupakan pembuatan rekod yang akan diberi tindakan oleh seorang pegawai lain, tetapi merupakan penyertaan aktif di dalam satu tindakan kehakiman (lihat ms 442H–443A, D–F).

(2) Di dalam isu bahawa pertuduhan atau pertuduhan-pertuduhan tersebut tidak berasas, majistret yang arif telah menggunakan kuasa kehakiman beliau dan bukan sahaja merekodkan pli-pli ataupun prosiding-prosiding hari itu. Pendapat orang awam ialah keputusan majistret yang arif bukan berdasarkan kekurangan keterangan atau penghujahan pemohon yang tidak cukup tetapi berdasarkan sentimen majistret yang arif terhadap pemohon. Kegagalan majistret yang arif untuk mencatatkan pertengkaran di antara beliau dan pemohon dan permohonan pemohon untuk menggugurkan pertuduhan mungkin menunjukkan suasana yang hangat pada masa itu. Walau bagaimanapun, kegagalan itu tidak relevan memandangkan suatu parti, dengan tidak menghiraukan rayuan-rayuan pemohon supaya beliau mengundurkan diri, terus mendengar perkara undang-undang substantif. Seksyen 439 Kanun Acara Jenayah mengisytiharkan bahawa majistret tidak boleh, kecuali jika dengan kebenaran daripada Mahkamah Tinggi, di mana sesuatu rayuan bergantung kepada mahkamahnya, membicara apa-apa kes di mana beliau merupakan parti atau mempunyai kepentingan peribadi (lihat ms 444A–B, D–E, 445B–D).

(3) Selain daripada pertuduhan s 506 salah dari segi fakta, ia juga tidak digubalkan dengan betul, dan ini akan memprejudiskan hak-hak pemohon. Penelitian s 506 menunjukkan bahawa terdapat dua jenis intimidasi, iaitu intimidasi biasa dan versi yang lebih serius di mana, antara lain, terdapat ancaman terhadap nyawa atau harta. Pertuduhan terhadap pemohon gagal menunjukkan di bawah intimidasi jenis yang mana beliau dituduhkan. Memandangkan bahawa pertuduhan tersebut tidak menerangkan ancaman tersebut, oleh itu, pada tahap minimumnya, pemohon dituduhkan di bawah jenis yang lebih ringan. Di bawah s 503 Kanun Keseksaan, untuk layak sebagai intimidasi jenayah biasa, bukan sahaja mesti terdapat actus reus, tetapi juga mens rea. Pertuduhan terhadap pemohon tidak mempunyai perkara kedua atau mens rea (lihat ms 445E–H, 446B–C).

(4) Penelitian nota-nota prosiding pada 3 September 2002 gagal menunjukkan sebarang percakapan sebegitu, pada masa itu atau di tempat itu, peluang ataupun komen-komen mahkamah. Nota-nota prosiding mencukupi untuk mematahkan pertuduhan pertama (lihat ms 447F).

(5) Di bawah s 173(g) Kanun Acara Jenayah, mahkamah boleh memberi pelepasan yang tidak membawa kepada pembebasan tertuduh di dalam keadaan tertentu. Apabila Parlimen menggubal perkataan-perkataan 'discharging the accused at any previous stage of the case if ... the charge to be groundless', 'previous stage' mesti bermakna, di dalam masa dan aturan, jangka masa sebelum tahap yang dibayangkan oleh s 173(f). Mahkamah mentafsirkan

s 173(g) sebagai termasuk masa apabila pertuduhan dibaca pada kali pertama kepada tertuduh, di hadapan majistret yang arif. Oleh itu, sebaik sahaja seseorang dibawa ke hadapan mahkamah, sebelum sebarang keterangan didengar, iaitu, sebelum perbicaraan bermula, seseorang tertuduh boleh memohon untuk dilepaskan. Pelepasan mungkin diwajarkan apabila keterangan dalam rekod jelas menunjukkan tiadanya alasan dan satu sabitan tidak mungkin boleh didapati. Di dalam kes ini, selain daripada pertuduhan tidak digubal dengan betul dan memprejudiskan pemohon, memandangkan bahawa perkataan-perkataan itu sangat khusus dan dibuat pada masa yang khusus tetapi dipatahkan pada permulaan kes oleh nota-nota prosiding yang disediakan oleh mahkamah, tidak mungkin ada sabitan. Pertuduhan s 506 tidak berasas dan terjatuh di dalam lingkungan s 173(g) (lihat ms 448C, H–I, 449B–D).

Notes

For cases on discharge of accused under Criminal Procedure Code (FMS Cap 6), s 173(g), see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), para 101.

For cases on error in charge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 940–941.

For cases on revision, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 2715–2788.

Cases referred to

Akberally Tayabali v Ali Mohammad AIR 1939 Bombay 372 (refd)
Baburao Hari Pawar v State of Maharashtra (1987) Cr LJ 584 (refd)
Chu Chee Peng v PP [1973] 2 MLJ 35 (refd)
Huddart Parker & Co, Proprietary, Ltd v Moorehead, Appleton v Moorehead (1909) 8 CLR 330 (folld)
Karpal Singh & Anor v PP [1991] 2 MLJ 544 (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69 (refd)
PP v Au Seh Chun [1998] 6 MLJ 179 (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311 (folld)
PP v Teoh Choon Teck [1963] MLJ 34 (refd)
PP v Yap Kok Meng [1974] 1 MLJ 108 (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100 (refd)
Yoh Meng Heng v PP [1970] 1 MLJ 14 (refd)

Legislation referred to

Criminal Procedure Code ss 156, 173, (f), (g), 323, 327, 334, 439
Federal Constitution art 121(1)
Penal Code ss 228, 503, 506

Appeal from: Criminal Trial No 83-66-2003 (Magistrate's Court, Sepang)

A *M Manoharan* (*VK Sharma, SG Yahna, P Waytha Moorthy, Karupaya, S Letchiemanan* and *P Dev Anand* with him) (*M Manoharan & Co*) for the applicant.

Kamarul Hisham Kamaruddin (Deputy Public Prosecutor, Attorney-General's Chambers) for the respondent.

B *Zalina bte Abidin* (Selangor Bar Committee) and *Edmund Bon* (Bar Council and Kuala Lumpur Bar) (Watching brief).

Charles Briefel ((Barrister) (International Commission of Jurists) and *Ramdas Tikamdass* (President of HAKAM) (Observers).

C **Suriyadi J**: On 31 January 2003, I received an application from Messrs M Manoharan & Co to revise the decision of the learned Magistrate of the Magistrate's Court, Sepang meted down on 21 January 2003, on the premise that the latter had refused to decline from presiding over two charges (and one alternative charge) Solicitor of the High Court of Malaya. Furthermore, that preferred against one Mr P Uthayakumar, an Advocate and learned magistrate had also refused to exercise his powers pursuant to D s 173(g) of the Criminal Procedure Code to discharge that advocate after having scrutinized the said charges. The charges were ss 228 and 506 of the Penal Code. The application before me was pursuant to s 323 of the Criminal Procedure Code, and if necessary I was to advert to s 327 of the same Code, if any consequential orders were to be made.

E During the revision proceedings, the court was informed by the learned deputy public prosecutor that the s 228 charge (and the alternative charge) would be dropped against Mr Uthayakumar at a later date. The former conceded that come 29 May 2003, the public prosecutor's office would wind up that matter. Relying on that information, I decided to focus the court's attention only on the s 506 charge, to avoid wastage of precious F judicial time. Notwithstanding the concession by the Public Prosecutor's office, as far as the court was concerned, both the charges (together with the alternative charge), until effectively withdrawn, were before the court whereby cognizance of them or alluding to them, if and when necessary, was in order.

G I now delve into the factual matrix of the case. It was not disputed that the said lawyer, Mr Uthayakumar had been present at the Magistrate's Court, Sepang on 3 September 2002 representing two families in two separate inquest proceedings pursuant to s 334 of the Criminal Procedure Code. The reference numbers of the inquests were Sepang Inquest 88-01-02 and 88-48-02. The learned magistrate who conducted the inquests, one H Norazmi bin Mohd Narawi, was assisted by a couple of deputy public prosecutors. In the course of the proceedings of Sepang Inquest 88-01-02, Mr Uthayakumar ('the applicant') was permitted to cross-examine PW1, one Chief Inspector Ponaiyah a/l Ganasan. The subsequent questions and answers exercise, as recorded in the notes of proceedings, thereafter ensued and they were, inter alia, as follows (translated version):

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Q: How long was he in hospital?

A: I do not know but he went in on 9 June 2002.

Q: On 12 June 2002 you were still the investigating officer?

A. Yes.

Q. Do you agree, if not seriously ill deceased will not be admitted into the hospital? [sic]

A: Disagree. [sic]

Q: Do you agree that after being seriously ill he was then admitted into hospital?

A: I did not know that he had been admitted into the hospital.

Q: Do you know that it is your duty to know why the deceased was sent to hospital?

A: Yes, I know that is my duty.

Q: Therefore if you did not know why he was admitted means that you were negligent? [sic]

A: I disagree.

Q: Why did you not order the handcuffs be removed when you knew he was sick - weak and vomiting?

A: On grounds of security - to prevent the deceased from escaping, pretending to be asleep or pretending to have fainted.

Q: Observe the photograph - from the rear - I say, according to the post mortem report, both hands of the deceased were handcuffed and he was allowed to die slowly. My instructions from the deceased's family are that this witness should be charged for murder or group murder. I wish to bring out the issue of criminal negligence committed by this witness as an investigating officer.

Court: You are ordered to stop from uttering such comments as it is a serious allegation and this witness can lodge a police report against you.

Case postponed for other witnesses.

Court: To 5 September 2002 (part heard)

(Signature illegible)

It transpired that at the same date of the inquest proceedings (3 September 2002), PW1 had lodged a police report against the said Mr Uthayakumar, resulting in the latter being brazenly arrested at the doorsteps of the Magistrate's Court at Sepang at 4.30pm on 16 January 2003 about four and a half months later. The latter was then carted off to the Sepang Police Station whereat he was detained and statements were recorded from him. According to Mr Uthayakumar, at the police station he was verbally abused by some exceptionally obnoxious police officers, stripped down to his

underpants, pictured and filmed in full view of nine policemen. If those allegations were true, I see no necessity for him to be humiliated and robbed of his human dignity in such manner and fashion. They should not have behaved like lords and masters in their little fiefdom, where others are equivalent to serfs, open to abuse and directions. All those relevant police officers, who were involved in the investigation, had to do was to merely adhere closely to the requirements or powers advanced to them by the Criminal Procedure Code, and no more.

After having been in custody for about 25 hours, he was finally released at about 5.30pm on 17 January 2003. On 20 January 2003, Mr Uthayakumar lodged two reports, the first being against the identifiable abusive officers who had allegedly deprived him of his constitutional rights, and the second against PW1, the said Chief Inspector Ponaiyah, for lodging a supposed false report, which had culminated in his arrest.

A day after the lodgment of those reports, that was 21 January 2003, whether by coincidence or design, Mr Uthayakumar was charged with such promptitude in court for the offences of criminal intimidation (s 506 of the Penal Code), and intentionally insulting or interrupting a public servant sitting in a stage of a judicial proceeding (s 228 of the Penal Code). The charges were as follows:

Pertuduhan pertama:

> Bahawa kamu, pada 3 September 2002, jam lebih kurang 4.15 petang, bertempat di Mahkamah Majistret Sepang, di dalam Daerah Sepang di Negeri Selangor Darul Ehsan, telah menakutkan secara jenayah terhadap Ponaiyah a/l Ganasan, secara mengugut dengan perkataan 'You watch out, I will fix you, we fix you', maka kamu dengan ini telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 506 Kanun Keseksaan.
>
> (Translated version:
>
> That you on 3 September 2002 in and about 4.15pm at the Sepang Magistrate's Court, in the district of Sepang, Selangor Darul Ehsan, had criminally intimidated Ponaiyah a/l Ganasan, by the threatening words 'You watch out, I will fix you, we fix you', and thus had committed an offence punishable under Section 506 of the Penal Code.)

Pertuduhan kedua:

> Bahawa kamu, pada 3 September 2002, jam lebih kurang 4.15 petang, bertempat di Mahkamah Majistret Sepang, di dalam Daerah Sepang di Negeri Selangor Darul Ehsan, telah dengan sengaja memberi aib kepada Majistret Norazmi bin Mohd Narawi semasa prosiding siasatan kematian Tharmarajen a/l Subramaniam apabila majistret tersebut telah mengarah kamu untuk diam dan jika enggan kamu boleh diarahkan keluar dari mahkamah tetapi sebaliknya kamu memberitahu majistret tersebut kamu tidak mahu keluar daripada mahkamah dan akan terus bercakap dan dengan ini kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 228 Kanun Keseksaan.

(Translated version:

That you on 3 September 2002 in and about 4.15pm at the Sepang Magistrate's Court, in the district of Sepang, Selangor Darul Ehsan, had intentionally insulted the magistrate Norazmi bin Mohd Narawi during the inquest of Tharmarajen a/l Subramaniam, when the said magistrate had ordered you to be quiet, in defiance of which you would be ordered to leave the court, had refused and informed the magistrate of your desire to carry on talking, and thus had committed an offence under Section 228 of the Penal Code.)

Pertuduhan alternatif kepada pertuduhan kedua

Bahawa kamu, pada 3 September 2002, jam lebih kurang 4.15 petang, bertempat di Mahkamah Majistret Sepang, di dalam Daerah Sepang di Negeri Selangor Darul Ehsan, telah degan sengaja menggangu Majistret Norazmi bin Mohd Narawi semasa prosiding siasatan kematian Tharmarajen a/l Subramaniam apabila majistret mengarah kamu untuk diam dan jika enggan kamu boleh diarahkan keluar dari mahkamah tetapi sebaliknya kamu memberitahu majistret tersebut, kamu tidak mahu keluar daripada mahkamah dan akan terus bercakap sehingga menyebabkan majistret menangguhkan prosiding siasatan kematian tersebut dan dengan ini kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 228 Kanun Keseksaan.

(Translated version:

That you on 3 September 2002 in and about 4.15pm at the Sepang Magistrate's Court, in the district of Sepang, Selangor Darul Ehsan, had intentionally distracted the Magistrate Norazmi bin Mohd Narawi during the inquest of Tharmarajen a/l Subramaniam, when the said magistrate had ordered you to be quiet, in defiance of which you would be ordered to leave the court, had refused and informed the magistrate of your desire to carry on talking, resulting in the inquest proceedings being adjourned, and thus had committed an offence under Section 228 of the Penal Code.)

Those charges were read out before the magistrate who had conducted the abovementioned inquests, the very judicial officer who was supposed to have been insulted or interrupted, as per the second charge (and the alternative charge). Indisputably, the latter could not be said to be an unconnected person in relation to those proceedings. At the stage of reading those charges, counsel for Mr Uthayakumar had requested that the learned magistrate, the said Norazmi bin Mohd Narawi decline from presiding over the proceedings, and/or otherwise dismiss the charges for being groundless and baseless pursuant to s 173(g) of the Criminal Procedure Code.

When the matter of bail cropped up, again Mr Uthayakumar was at the receiving end. Any uninitiated person could easily have seen or pointed out that that learned magistrate should have been the last person to hear the bail matter, for the obvious reason of him being an interested party. Even if he had considered that the bail amount was fair (and even if it were), the perception gathered by the public would certainly militate against it. As far as the public and I were concerned, as justice was not seen done, it never

was done. This was not a mere recording exercise to be acted upon later by an incoming officer but an active participation in a judicial act.

Evidentially, this proactive judicial exercise carried out by the learned magistrate as regards that bail matter absolutely contradicted his documentary explanation to which I was privy. It reads:

> Oleh kerana ia adalah semata-mata sebutan untuk penetapan tarikh perbicaraan, maka atas pengalaman saya yang cetek tentang perkara ini telah berpendapat tidak menjadi apa-apa masalah kerana bukan saya yang akan mengendalikan perbicaraan tetapi hanyalah untuk merekodkan apa-apa pengakuan dan menentukan kadar ikat jamin yang sesuai jika dipohon oleh pihak pendakwa raya, iaitu Tuan Kamaludin, tanpa ada sebarang niat untuk mengambil kesempatan menganiayai atau menekan En Uthayakumar.
>
> (Translated version:
>
> On the premise that this was merely for mention and to set the date of hearing, and based on my inexperience regarding this matter, I had decided that this act would not cause any problem, as I would not be hearing the case, it was merely to record the pleas and to decide on the bail amount if requested by the deputy public prosecutor, one Tuan Kamaludin, without any thought of taking advantage of the situation and prejudicing the interest of Mr Uthayakumar.)

In a gist, it could not be denied, after having sifted the above translated version, that the learned magistrate had not just been a mere stenographer for purposes of recording the pleas and the proceedings, but had in fact been enthusiastically active in a judicial making exercise (not only limited to the granting of the bail but exacerbated by the amount to go with it). In that aspect, he had exercised judicial power, which is vested not only in the two High Courts but also in the magistrate's court as legislated in art 121(1) of the Federal Constitution. In *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 Zakaria Yatim J, as he then was, had occasion to remark at p 313:

> In my opinion, the term 'judicial power' used in art 121(1) means, ... In the context of criminal law, the court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty. Judicial power includes:
>
> (1) ...;
>
> (2) ...;
>
> (3) the power to grant or refuse bail to an accused person, ...

In the case of *Huddart Parker & Co, Proprietary, Ltd v Moorehead, Appleton v Moorehead* (1909) 8 CLR 330, Griffiths CJ of the High Court of Australia had opined that judicial power meant the power to decide controversies between subjects and the institution or between subjects themselves, relating to life, liberty or property. The exercise of that power began the moment some tribunal, which had power to give a binding and authoritative decision (whether subject to appeal or not) was called upon to take action. I see no reason to disagree with that view. That being so, persuaded by the above two cases, the issue of bail would certainly fall within the purview of the concept of judicial power.

Had common sense prevailed, another officer should have been enlisted to resolve this bail matter, a constitutional right intertwined with the liberty and freedom of an individual. Even though this issue was a side matter, yet it was an indication of things to come, portraying the lack of sensitivity or appreciation of the principles of justice on the part of the learned magistrate. A

In similar vein, when Mr Uthayakumar had ventilated that the charge or charges were groundless, it was inconceivable that any person in their right frame of mind would have seriously expected that magistrate to agree to that view. To discharge him then, in acquiescence to his request in the circumstances of the case, would require a man of prophet-like mettle. It does not require an eminent psychologist to opine that any recipient of a supposed insult or unruly behavior, as particularized in the second charge, would not be *jarred or affected, and perhaps even hold a grudge* against the alleged miscreant, in this case the very applicant himself. It is human nature to possess such emotions. I have not resorted to the word 'prejudiced' in the latter sentence, to avoid overstating the matter in the circumstances of the case. B C

Regardless of the descriptive words adverted to, with that unhappy scenario in mind, the attempts of Mr Uthayakumar would have been a non-starter, as he was doomed to failure even before he could open his mouth. When rejecting the application, again the learned magistrate was exercising his judicial powers and not merely recording the pleas or proceedings of the day. In the context of this case, the public's view, and certainly it could not be defaulted, would be that the decision of the learned magistrate was founded not on the lack of evidence or the inadequacy of the applicant's submissions but substantially on the sentiments held by the learned magistrate against the former. Certainly an aberration in the administration of justice had taken place on that fateful day. D E

Again, alluding to the letter which I was privy to, the learned magistrate had this to say: F

> Memandangkan kenyataan tersebut telah menimbulkan keadaan yang tegang di dalam mahkamah, saya telah mengarahkan En Uthayakumar berhenti membuat kenyataan tersebut yang menyebabkan berlaku perbalahan lisan antara saya dan beliau menyebabkan saya menyuruh dia diam dan berhenti bercakap dan memberi amaran bahawa saya boleh mengarahkan beliau keluar. G
>
> Saya terpaksa menangguhkan kes ke satu tarikh lain dan meminta Mr AK Leong, iaitu peguam pemerhati dari Majlis Peguam untuk menasihati En Uthayakumar dengan sewajarnya.
>
> Semasa itu juga, saya agak ragu-ragu sama ada saya boleh mensabitkan beliau dengan kesalahan menghina mahkamah kerana saya tidak pasti dari segi peruntukan undang-undang yang tepat yang membolehkan saya berbuat demikian dan membentuk kesalahan yang telah dilakukan ... . H

It was crystal clear from the above explanation, and without the necessity of having it translated, these conclusions could be arrived at, viz: I

(1) there were heated exchanges between the learned magistrate and Mr Uthayakumar;

(2) the learned magistrate had complained to Mr AK Leong, a representative of the Bar Council, about Mr Uthayakumar's conduct;

(3) that had the learned magistrate been more knowledgeable, he would not have hesitated to charge Mr Uthayakumar for contempt; and

(4) beyond a shadow of a doubt, there already was bad blood flowing between them.

In the circumstances of the case, justice would certainly not have been attainable from any point of view, let alone the applicant's. The failure of the learned magistrate to minute the exchanges between them, and the request of Mr Uthayakumar to have the charges dropped, may be an indication of the charged atmosphere at that juncture. Regardless of that, that failure had become irrelevant in the light of a highly interested party, in total disregard of appeals by the applicant to see him step down, continuing to hear substantive legal matters. Common sense aside, statutorily, he should not have presided at all. Suffice if I were to advert to s 439 of the Criminal Procedure Code, which in crystal clear language promulgates that no magistrate shall, except with the permission of the High Court to which an appeal lies from his court, try any case to or in which he is a party or personally interested. Surely, any High Court judge would impose an unusually high premium before any permission was to be granted in such circumstances. Where, as in this case, permission was yet to be obtained, and the proactive and participatory act of the learned magistrate being beyond redemption, the proceedings thus had become highly tainted.

Apart from the abovementioned reasons, more than ample to justify my interference, I could not help but conclude that apart from the charge of s 506 being factually incorrect, it was also badly drafted, which would certainly prejudice the rights of the applicant. I will start off with the latter poser. The date, time and place were particularized ('*September 3, 2002 in and about 4.15pm at the Sepang Magistrate's Court, in the district of Sepang, Selangor Darul Ehsan*'). The actus reus was undeniably included ('*had criminally intimidated Ponaiyah a/l Ganasan, by the threatening words "You watch out, I will fix you, we fix you"* '). The relevant provision was also identifiable ('*offence punishable under section 506 of the Penal Code.*').

A close scrutiny of s 506 will reveal that there are two sets or limbs of intimidation, namely simple intimidation or a more serious version where, among others, the threat to life or property is involved. The latter naturally carries a heavier sentence. A semi colon delineates the two sets. Regretfully, the charge against the applicant had failed to identify under which limb or set he was charged with, as it merely ingrained that he had committed an offence under s 506. As the charge had not clarified whether the threat was to cause death, grievous hurt, destruction of property by fire, or to cause an offence punishable with death or imprisonment, then in the minimum, the applicant was being charged for the lighter limb (first). Regardless of my construction, it is cold comfort for the applicant, as that uncertainty will not assist him when preparing his case. It cannot be overstated that a charge must be certain in all cases, as otherwise an accused person will be left guessing, and prejudicially embarrassed not knowing what he had

contravened or how to counter the allegations (*Public Prosecutor v Teoh Choon Teck* [1963] MLJ 34; *Yoh Meng Heng v Public Prosecutor* [1970] 1 MLJ 14). Hashim Yeop A Sani J, as he then was, in *Public Prosecutor v Yap Kok Meng* [1974] 1 MLJ 108 had remarked at p 109:

> It is fundamental in the system of justice as we know it that a person accused of a criminal offence must be informed clearly of the charge against him. ... ... It is a fundamental rule that an allegation must be stated with sufficient precision to enable the accused to meet the allegation and properly prepare his defence.

Under s 503 of the Penal Code, to qualify even as a simple criminal intimidation (under the first limb), not only must there be the actus reus, in the like of injuring a person, his reputation or property, or to the person or reputation of anyone in whom that person is interested, but also the mens rea. The latter will be in the form of intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, etc. In other words, to fall within the ambit of this section, regardless of the limb under which an accused is charged, both legal ingredients must be present.

Ratanlal & Dhirajlal's *Law of Crimes* endorsed the division, where at p 2576 it authored:

> This section defines comprehensively 'criminal intimidation'. Section 506 provides penalty for it. *This section is in two parts: the first part refers to the act ...; while the second refers to the intent* ... . (Emphasis added.)

RP Kathuria in *The Law of Crimes and Criminology*, at p 4012 had occasion to comment:

> Intent specified in the section is also an essential ingredient of the offence and must be established by evidence and must be found as a fact.

This same author had the following, as a specimen charge:

> That you, on or about ... at ... committed criminal intimidation by threatening A with injury to his person (reputation or property)(specify which) in whom A is interested (state how interested) (*actus reus — mine*) with intent (*mens rea — mine*) to cause alarm to A or to cause him to do an act which he is legally bound to do (or to cause him to omit to do an act which he is legally bound to do) (specify the act) and thereby committed an offence punishable under s 506 IPC [Indian Penal Code] and within my cognizance. (Emphasis added.)

At p 2597 of Ratanlal & Dhirajlal's *Law of Crimes* is found a specimen of a s 506 charge, quite similar to the above and appears as follows:

> That you, on or about the ... day of ..., at ..., *committed criminal intimidation by threatening AB with injury* (actus reus — mine) to his person [or reputation, or property] *with intent* (mens rea — mine) to cause alarm to the said AB [or to cause him to do (specify the act intended to be done) or to omit (specify the act intended to be omitted)]; and thereby committed an offence punishable under s 506 of the Indian Penal Code, and within my cognizance [or cognizance of the Court of Session]. (Emphasis added.)

A It is quite obvious that the above specimens not only had included the *actus reus* but also the *mens rea*. In comparison to the above example proffered by Ratanlal and RP Kathuria, the charge facing the applicant clearly had missed the second ingredient of intent or *mens rea*. To regurgitate, not only was the charge unclear as to whether the applicant was charged for an offence under the first or the second limb, but there was failure to insert the B *mens rea* ingredient even had he been charged under the lighter limb, let alone the heavier one. The latter would certainly not know whether the missing *mens rea* was with an intent to cause alarm to that person, to cause that person to do any act which he is not legally bound to do, etc or what. Had it been for the heavier one, he would be wondering whether he was C being charged with criminal intimidation intending to cause death, grievous hurt, destruction of property by fire, etc.

I now touch on the next poser. The charge had stated that Mr Uthayakumar had uttered the intimidating words 'You watch out, I will fix you, we fix you', with the applicant profusely denying uttering them. The learned deputy public prosecutor had vehemently stressed that no court D would have been able to conclude that the charges were groundless when the facts were yet adduced. Unlike the laborious days when preliminary enquiries existed, and courts would have been able to come to some conclusion based on the recorded testimonies, the current predicament was certainly of no help to the magistrate. Much as I agree in part with his E argument, I was certainly not denied of some other facts before me, in particular the ingredients packed in the other charges.

Without the necessity of repeating the above charges, in particular the second and/or the alternative charges, the incidents of insulting and distracting (s 228) had taken place during the hours of 4.15pm which was smack in the middle of the judicial proceedings. The supposed intimidating F words, as per the s 506 charge, likewise had occurred at about the same time the altercation was taking place. Yet a scrutiny of the notes of proceedings of 3 September 2002 failed to reveal any utterances of that nature, at that time or place, the opportunity, or for that matter comments by the court. The notes of proceedings were more than sufficient to rebut the first charge. In other words, even at that early stage, prior to the commencement, let G alone the closing of the prosecution's case, the charge was apparent to all and sundry that it was groundless.

Sohoni at p 2706 of the *Code of Criminal Procedure* had occasion to author:

H

> In other words, discharge is permissible only when there are no sufficient grounds for trying the accused. It follows therefore that even in a case where sufficiency of grounds is doubtful, the proper thing to do is to proceed with the trial. To put it in other words, discharge is warranted only when the absence of sufficiency of grounds is *clearly established by the evidence on record.* (Emphasis added.)

I Under s 156 of the Criminal Procedure Code, it is provided that 'no error in stating either the offence or the particulars ... shall be regarded ... as material ... unless the accused was in fact misled by such error or omission'.

The prevailing uncertainty here, particularly the part of not knowing which limb he was being charged for, could easily mislead the applicant in his preparation of his case, a scenario that would clearly be prejudicial to the interests of the applicant.

His Lordship Abdul Hamid CJ (Malaya) in *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69, at p 70, had distinctly said:

> It is also clear that the High Court may examine the record of proceedings in the subordinate courts wherever it considers that in doing so the purpose of justice will be served, as for example, when the record discloses no offence or when the accused is subjected to a vexatious and *groundless prosecution* (*Ramanathan Chettiyar v Subrahmanya Ayyar* ILR 47 Mad 722). (Emphasis added.)

There is a plethora of cases, which have enunciated that under s 173(g) of the Criminal Procedure Code, a court is statutorily provided with some room to manoeuvre, whereby a court may sustain a discharge not amounting to an acquittal in certain circumstances (*Chu Chee Peng v Public Prosecutor* [1973] 2 MLJ 35; *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100; *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; *Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179). It must be emphasized that there is a world of difference between a discharge (implying not amounting to an acquittal), and an outright acquittal where the former the accused may be recharged. It is quite trite that there is no provision found in the Criminal Procedure Code for the court to acquit a person if the public prosecutor is still interested in pursuing the charge, especially when the evidence to be adduced, has yet to be heard. To wind it up, and in the circumstances of the case, at best, the accused may merely have a temporary respite at that. The tiny apertures, which are small comforts for the applicant, are found in the sub-provisions of s 173(f) and (g) of the Criminal Procedure Code, and they read:

> (f) (1) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (g) Nothing in paragraph (f) shall be deemed to prevent the Court from *discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless*. (Emphasis added.)

When Parliament had legislated the words 'discharging the accused at any previous stage of the case if ... the charge to be groundless', that previous stage must mean, in terms of time and order, a period before the stage envisaged by s 173(f). I construe s 173(g) as being wide enough to include the time when the charge was read out the first time to the accused, before the learned magistrate. So, as soon as a person is committed before the court, before any evidence is heard, ie before the trial commences, an accused may request for a discharge (Sohoni at p 2704 of the *Code of*

Criminal Procedure; *Baburao Hari Pawar v State of Maharashtra* (1987) Cr LJ 584). To submit that it is premature for the accused to ask for a discharge before any evidence is adduced would deny the accused person of the only outlet available to him, and in the process entrenching that provision for decorative purposes only.

As to whether a charge is groundless will depend very much on the salient facts and the matter at hand. A person charged for an offence unknown in law, a charge based on an incomplete police investigation, among others, may come under the category of a groundless charge (*Mallal's Criminal Procedure*, p 3169). In brief, a discharge may be warranted when the absence of grounds is clearly established by the evidence on record, with the attainment of a conviction being impossible (*Akberally Tayabali v Ali Mohammad* AIR 1939 Bombay 372). In this case, apart from the charge being very badly framed much to the prejudice of the applicant, as the words uttered were very specific and made at a specified time but yet rebutted at the outset of the case by the notes of proceedings prepared by the court, conviction thus was impossible. In a gist, the s 506 charge was groundless and had fallen squarely within the ambit of s 173(g).

To conclude, pursuant to my revisionary powers under the Criminal Procedure Code, I have no compunction in setting aside the learned magistrate's order, and instead order that the applicant be discharged of the s 506 accusation. This discharge must not be construed as an indication of any desire to disallow this prosecution, whether as a matter of policy or otherwise, of which I have no power, but primarily a decision based on the available records. The court's regrets are secondary to the awesome power of the public prosecutor in relation to preferring a charge against the applicant, engaged at the very outset to perform his time honored duty, but sidetracked perhaps by ineffectual and empty bravado. As an observation, if there was truth as per the allegation of the charge, here was a mere man, armed without any resources except enthusiasm, who had the temerity in an unguarded moment, having picked on no less than a personnel of another powerful state institution, backed by equally powerful resources.

It is gratifying that the counsel had apologized to the learned magistrate, and the Right Honorable Attorney-General, through his officer, had indicated that the contempt proceedings against the applicant would be withdrawn. Further, due to the chequered history of this case, and wide reporting of the matter, the police department, the legal fraternity and the court, are uncomfortably under intense scrutiny of the public. Perhaps this whole sad episode could be put to rest permanently, if all parties were to put their heads together, goodwill prevailing.

The learned magistrate's order set aside and applicant ordered to be discharged of the s 506 accusation.

Reported by Chew Phye Ken